87-1106

No.

In the Supreme Court of the United States

OCTOBER TERM, 1987

GEORGE T. PYLE AND SHIRLEY J. PYLE,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

The sole question presented for review in this petition is whether the United States Court of Appeals for the Eighth Circuit rendered their decision in this case in a manner that is in direct conflict with the law of Missouri on the issue of respondeat superior as set forth by the Supreme Court of Missouri.

PARTIES TO THE PROCEEDING

The caption of this case contains the names of all parties to this proceeding.

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REFERENCE TO OFFICIAL AND UNOFFICIAL REPORTS OF OPINIONS

There have been no official or unofficial reports of opinions in this case to date, however, the decisions of the United States District Court for the Southern District of Missouri and the United States Court of Appeals for the Eighth Circuit are incorporated as part of the Appendix to this Petition.

STATEMENT OF JURISDICTION

Petitioners request the Court to review the decree and opinion of the United States Circuit Court of Appeals for the Eighth Circuit entered in this case and styled

George T. Pyle and Shirley J. Pyle vs. *United States of America,* in the United States Circuit Court of Appeals for the Eighth Circuit, Case No. 86-2150. This appeal was submitted on April 16, 1987 and decided on August 27, 1987. Petitioners' motion for a rehearing was denied on September 22, 1987.

This Court has jurisdiction to review the decree in question by Writ of Certiorari pursuant to 28 U.S.C. § 1254(1).

APPLICABLE STATUTES

The Federal Statute applicable in this case is 28 U.S.C. § 2674, which is part of the Federal Tort Claims Act. The text of that statute is as follows:

§ 2674 Liability of United States

> The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.
>
> If, however, in any case wherein death was caused, the law of the place where the act or omission complained of occurred provides, or has been construed to provide, for damages only punitive in nature, the United States shall be liable for actual or compensatory damages, measured by the pecuniary injuries resulting from such death to the persons respectively, for whose benefit the action was brought, in lieu thereof. June 25, 1948, c.646, 62 Stat. 983.

STATEMENT OF THE CASE

This is a civil action for damages arising out of an automobile accident which took place on December 5, 1981 near the city of Bolivar, Missouri. The accident involved two vehicles, one of which was driven by Petty Officer Patrick Martin, then on active duty in the United States Navy. The United States District Court for the Southern District of Missouri, per the Honorable William R. Collinson, Senior District Judge, made certain findings of fact in this case which are incorporated as part of the Appendix to this Petition. The findings of fact were supported by the evidence and have gone unchallenged by respondent and are therefore binding. Rather than repeating those findings of fact, petitioner would respectfully direct the Court's attention to that portion of the Appendix.

The United States District Court for the Southern District of Missouri found in favor of petitioners on their claims for personal injuries arising out of the above-described automobile accident and awarded damages in the total amount of $250,000.00 for both plaintiffs. The United States Court of Appeals for the Eighth Circuit reversed holding as a matter of law that Petty Officer Martin was not in the course and scope of his employment with the United States Navy in accordance with the law in the State of Missouri. In so doing, the United States Court of Appeals for the Eighth Circuit made its decision in direct conflict with the law of the Supreme Court of Missouri on the issue of respondeat superior and course and scope of employment.

The United States District Court for the Southern District of Missouri had jurisdiction in this case pursuant to 28 U.S.C. § 1346(b) which provides that the Federal Dis-

trict Court shall have exclusive jurisdiction of civil actions or claims against the United States for money damages.

ARGUMENT

The pertinent facts necessary to decide the narrow issue of this case are simple and uncontested. They revolve around the question of whether Petty Officer Martin was in the course and scope of his employment with the Navy at the time of this accident.

Having been brought under the Federal Tort Claims Act, 28 U.S.C. § 2671 *et seq.*, the United States District Court for the Southern District of Missouri was obligated to decide the factual issues of this case in accordance with the law of the state where the accident occurred, specifically in this case, the law of the State of Missouri. *Williams v. United States*, 350 U.S. 857 (1955).

The government has never contended that the evidence in this case did not support the findings of fact made by the Honorable Judge Collinson. As such, it has long been held that those findings are binding and conclusive. *Gideon-Anderson Lumber Company v. St. Louis Southwestern Railway Company*, 88 F.2d 232 (8th Cir. 1937). The facts presented at the trial of this case and found as conclusive by the District Court follow in narrative form.

Prior to the accident, Petty Officer Martin was stationed in Orlando, Florida. He completed his training there on December 1, 1981 and was ordered to Idaho Falls, Idaho. At the time of the accident, he was on travel

time alloted by the Navy for the purpose of traveling from one station to the other. Travel time is not tantamount to leave, the latter being vacation time. Martin used his own automobile and was reimbursed between $800.00 and $900.00 for the trip. During the trip, the Navy had complete authority to order Petty Officer Martin to change his course or mode of transportation at any time during the trip. Although he intended on stopping at his parents' house in Richmond, Missouri, he was traveling a direct route between Orlando, Florida and Idaho Falls, Idaho at the time of the accident. While traveling, Petty Officer Martin was subject to the orders of his destination commander following his departure. As such, Martin was subject to the orders of the commanding personnel at Idaho Falls, Idaho at the time of the accident. While traveling, Martin was subject to military discipline if he failed or refused to obey an order given by his commander. The specific authority the Navy held over Martin was demonstrated by the fact that immediately after this accident the Navy changed Martin's official orders and put him on temporary disability status while he was recovering from injuries sustained in the accident. The trip in question was made at the direction of the Navy and for the purpose of furthering the business of the Navy.

The accident in question occurred on December 5, 1981 at approximately 7:00 a.m. Martin's car crossed the center line and collided head-on with the plaintiffs' car. At all times in question Petty Officer Martin was on active duty with the Navy and was an employee of the Navy. It was determined for purposes of his disability that he was in the line of duty at the time of the accident.

The Court of Appeals determined that since the Navy did not control the physical acts or movements of Martin at the very moment of the accident, that Martin was therefore not in the course and scope of his employment. The Court of Appeals relied on *Bissell v. McElligott,* 369 F.2d 115 (8th Cir. 1966), *cert. denied,* 387 U.S. 917 (1967). In so doing, the Court of Appeals decided this case in direct contravention to Missouri law as enunciated by the Missouri Supreme Court. In this case, there was no issue as to whether or not Martin was employed by the Navy at the time of the accident. It was admitted that he was on active duty. When the question of actual employment is not in issue, Missouri law requires that the courts determine whether the employees' acts are imputable to the master, in this case the United States Navy, by examining whether or not the acts were within the "scope and course of employment." *Brock v. Firemen's Fund of America Insurance Company,* 637 S.W.2d 824, 828-829 (Mo. App. 1982). In relying on *Bissell v. McElligott, supra,* the Eighth Circuit decided this case in direct contravention to the law as set forth by the Missouri Supreme Court in *Brannaker v. Trans American Freight Lines, Inc.,* 428 S.W.2d 524 (Mo. 1968) and *Burks v. Leap,* 413 S.W.2d 258 (Mo. 1967), both of which are cases which were decided after *Bissell* was handed down in 1966.

Both *Brannaker, supra,* and *Burks, supra,* held that if the master-servant relationship is admitted or otherwise proved, the next inquiry under Missouri law is whether the acts committed by the servant were in the course and scope of his employment. In determining that issue, there must be some evidence that the employer had a special interest in the employee's trip, *Bran-*

naker, supra, at page 535, or that the acts were of the type the servant was employed to perform and were done to serve the business of the master. *Brock, supra,* at 268. This rule has also been followed by the Missouri Court of Appeals in *Ares v. Owens,* 407 S.W.2d 33 (Mo. App. 1966) which specifically adopted the Restatement of Agency 2d § 236, concerning what constitutes action within the course and scope of employment:

> If the purpose of serving the master's business actuates the servant to any appreciable extent, the master is subject to liability if he acts otherwise within the service. *Ares, supra,* at 35.

This rule of law is further highlighted by the Missouri Approved Jury Instructions (M.A.I.), specifically M.A.I. 13.05 (1978 Revision) which is used to instruct juries in Missouri in cases where (1) the employer-employee relationship is admitted, but (2) there is an issue of fact as to whether or not the employee's actions were within the course and scope of his employment. *Brock v. Firemen's Fund of America Insurance Company, supra.* That instruction, if given in this case, would have read as follows:

> Acts are within the "scope and course of employment" as that phrase is used in this instruction if:
>
> (1) They were part of the work Petty Officer Martin was employed to perform, and
>
> (2) They were done by Petty Officer Martin to serve the business of the Navy.

In following *Bissell v. McElligott, supra,* the Eighth Circuit Court of Appeals misapplied the law in the state of Missouri and improperly reversed this case. The Supreme Court of Missouri, as shown above, has firmly de-

cided subsequent to the *Bissell* case that in order for acts to be in the course and scope of employment, when the master-servant relationship is admitted, they must simply be acts that were of the type that the employee was employed to perform and done in order to further the business interests of the employer. It is not necessary to make a finding that the Navy actually controlled the physical acts and movements of Petty Officer Martin at the very moment of the collision, as decided by the Eighth Circuit. Rather, as Judge Collinson of the United States District Court for the Southern District of Missouri correctly decided, the question of whether Martin was in the course and scope of his employment was answered succinctly by the evidence and findings of fact that his trip was made at the direction of the Navy and to further the business purpose of the Navy. To be sure, there was no contradictory evidence at the time of trial.

CONCLUSION

In deciding this case based on the standard of *Bissell v. McElligott, supra,* the United States Court of Appeals for the Eighth Circuit applied laws and standards in direct contravention of the law of the State of Missouri. As such, their decision must be reversed and the trial court's judgment re-entered in accordance with a proper decision under the law of the State of Missouri as required by *Williams v. United States,* 350 U.S. 857 (1955).

Respectfully submitted,

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(Filed July 14, 1986)

IN THE
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF MISSOURI
SOUTHERN DIVISION

No. 84-3381-CV-S-2

GEORGE T. PYLE and SHIRLEY J. PYLE,
Plaintiffs,

v.

UNITED STATES OF AMERICA,
Defendant.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

INTRODUCTION

Plaintiffs George T. Pyle and Shirley J. Pyle were seriously injured in an automobile collision on Highway 32 east of Bolivar, Missouri, at approximately 7:00 a.m. on December 5, 1981. The car that collided with the Pyles' car was driven by Patrick Eugene Martin. At the time of the accident, Mr. Martin was a Petty Officer in the United States Navy en route to his permanent station pursuant to naval travel orders. Thus, the main issue before this Court is whether or not Petty Officer Martin was, at the time of the accident, acting within

the course and scope of his employment as a member of the United States Navy. If so, the plaintiffs are entitled to recover against the defendant United States of America pursuant to the Federal Tort Claims Act, 28 U.S.C. §§ 2671, *et seq.*

This Court has jurisdiction in this matter pursuant to 28 U.S.C. § 1346(b). All administrative remedies have been exhausted by plaintiffs as required by the Federal Tort Claims Act. The following shall constitute this Court's findings of fact and conclusions of law required by Rule 52 of the Federal Rules of Civil Procedure.

FINDINGS OF FACT

Prior to the date of this accident, Petty Officer Martin had been stationed in Orlando, Florida, at the Nuclear Propulsion Systems School for approximately seven months. He completed his training at the Nuclear Propulsion Systems School on December 1, 1981.

After the above date the "paper trail" disappeared. Although ordered by the Court, the Navy Department has been unable to produce any further written records pertaining to Petty Officer Martin. The defendant's witness, Chief Yeoman Ross, testified, as an expert, that Martin would have been furnished at least ten copies of his travel orders and that a copy would be currently filed in the Navy office and a copy sent to the Navy station to which he was being transferred. The only explanation was that there was just "so many papers" that it was impossible to find the copies of the particular travel orders upon which he was traveling. Petty Officer Martin testified as to his recollection of these travel orders and there is no dispute that the facts he recited are basically correct. His testimony was that on December 4,

1981 he received written travel orders for a permanent change of station to Idaho Falls, Idaho; that he was authorized to use his personal car for transportation; that the orders granted him eight days travel time plus eight days leave time; and that before departure he was paid his mileage and a per diem amount for eight days room and board. He could not remember the exact amount but stated it was between $800.00 and $900.00 from the Navy.

Travel time is time allotted pursuant to written travel orders for the movement of Navy personnel from one permanent station to another permanent station. Travel time is not tantamount to leave, the latter being, in essence, a civilian's vacation time. The written travel orders allotted Petty Officer Martin eight days for travel time. The Navy calculates travel time based on 300 miles per day when traveling by automobile.

In addition to the eight days travel time, Petty Officer Martin was planning on taking eight days additional leave time. Because of this accident, however, the leave time was never taken.

The route which Petty Officer Martin was traveling from Orlando, Florida to Idaho Falls was a direct one. Although the Navy did not direct Petty Officer Martin to travel upon selected highways, the Navy had authority to order Petty Officer Martin to change his course or mode of transportation at any time during the trip.

Moreover, the mileage paid Petty Officer Martin was calculated by the most direct route and not by actual miles traveled by him. Assuming proper procedures were followed, Petty Officer Martin was subject to naval orders and naval control while traveling from Orlando, Florida

to Idaho Falls, Idaho. While traveling, Petty Officer Martin was subject to the orders of his destination commander beginning at one minute after midnight the day following his departure. As such, at the time of this accident, Martin was subject to the orders of the commanding personnel at the Idaho Falls, Idaho station to which Martin was traveling. While traveling pursuant to orders, Petty Officer Martin was subject to military discipline if he failed or refused to obey an order given by his commander. In fact, shortly after this accident, the Navy did change Petty Officer Martin's official orders. Immediately after this accident, Petty Officer Martin's official orders were changed and he was placed on temporary disability status while recovering from his injuries.

There is no doubt that Petty Officer Martin's trip was made at the direction of the Navy. Petty Officer Martin's trip was made to further the business purposes of the Navy. Petty Officer Martin would not have been in Missouri on December 5, 1981, had the Navy ordered him to travel, for example, from Orlando, Florida, to Hilton Head, South Carolina.

Although Petty Officer Martin was planning on stopping at his parents' house in Richmond, Missouri, the night of the accident, the fundamental purpose of his presence in Missouri was to make the trip from Florida to Idaho pursuant to his travel orders. Had Martin been transferred from Orlando to a place which did not include Missouri in its direct line, Petty Officer Martin would not have been in Missouri on the day of the accident.

The accident in question occurred on December 5, 1981 at approximately 7:00 a.m. Petty Officer Martin was traveling westbound on Missouri Highway 32, east

of Bolivar, Missouri, when his car crossed the center line of that highway colliding headon with the plaintiffs' car. At the time of the accident, Petty Officer Martin had been driving his car continuously from Orlando, Florida, beginning at approximately 6:00 a.m. on December 4, 1981 to the point of the accident with the exception of approximately four hours when he pulled over to the side of the road in Birmingham, Alabama, to sleep.

At the time of the accident, plaintiffs were traveling eastbound on Missouri Highway 32 in the proper lane of traffic. At the time of the accident, Mr. Pyle was 48 years old and Mrs. Pyle was 45 years old. At the time of trial they were 52 and 50 years old respectively. As a result of the accident, George T. Pyle and Shirley J. Pyle sustained injuries. George T. Pyle was pinned in his car with his left ankle caught beneath the dash for approximately one hour. Mrs. Pyle was assisted from the car by ambulance attendants 15 to 20 minutes after the accident. She was fading in and out of consciousness during this time. She was aware of the accident and the fact that her husband was trapped in the car.

Mrs. Pyle sustained two broken ribs and four fractured teeth. These teeth supported two bridges in her mouth. She required two root canal therapies and received a bridge which supports most of her upper teeth. There is still some tenderness around tooth number 14.

Mr. Pyle's injuries included a severe fracture, dislocation of his ankle joint, including fractures of his tibia and fibula. Mr. Pyle also fractured three teeth and his left great toe. A root canal was required on one of his fractured teeth. Additional dental repair was required on two of his fractured teeth.

Although Mrs. Pyle was released from the hospital on the day of the accident, her husband remained in the hospital for approximately 15 days. Surgery was performed on Mr. Pyle's right ankle and lower leg in an attempt to repair the damage. Mr. Pyle has permanent and disabling injuries including loss of range of motion, traumatic arthritis, pain, swelling, loss of strength, inability to walk normally, inability to bear weight normally, numbness and tingling.

Mrs. Pyle has a permanent dental injury which may require further treatment including a partial or full upper denture. Mr. Pyle's inability to bear weight normally has severely lmited his activities. All of the plaintiffs' injuries were caused by the December 5, 1981 auto accident which gave rise to this case. As a result of the accident, Mr. Pyle incurred medical bills of $5181.91. Mrs. Pyle incurred medical bills of $3174.25. There was no loss of wages suffered by the plaintiffs.

Immediately after this accident, Petty Officer Martin's official orders were changed and he was placed on temporary disability status while recovering from his injuries. At the time of the collision which gave rise to this lawsuit, Petty Officer Martin was on travel time pursuant to his written travel orders. These orders were ratified by the Department of the Navy. The Navy determined for disability purposes, that Petty Officer Martin was on active duty at the time of the accident and was injured in the line of duty.

DISCUSSION

Under the Federal Tort Claims Act and 28 U.S.C. § 1346(b), the United States is liable for damages for personal injuries caused by the negligent act of any em-

ployee of the government while acting within the scope of his employment under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act occurred.

Title 28 U.S.C. § 2671 states:

> "Acting within the scope of his office or employment," in the case of a member of the military or naval forces of the United States or a member of the National Guard as defined in section 101(3) of title 32, means acting in line of duty.

The words "line of duty" in the statute just quoted go no further than to invoke state law of respondeat superior with respect to tort claims arising out of alleged wrongful acts of military personnel. *Williams v. United States*, 350 U.S. 857 (1955). Hence, the Court may not rely upon the Navy's determination that Petty Officer Martin was acting in the line of duty at the time of the accident. The Court must go further in determining whether or not Petty Officer Martin was within the course and scope of his employment at the time of the accident by applying the legal doctrine of respondeat superior as it exists in Missouri. There is no disagreement among the parties that Missouri law is controlling. However, the two cases reported in this Circuit that are factually similar to the case at bar and apply Missouri law reach opposite conclusions. In *Bissell v. McElligott*, 248 F.Supp. 219 (W.D. Mo. 1965), *aff'd*, 369 F.2d 115 (8th Cir. 1966), *cert. denied*, 387 U.S. 917 (1967), Judge Oliver held that under Missouri law, the United States was not liable for the death and injuries in an automobile accident allegedly caused by the negligence of an Air Force sergeant who had complete freedom to select the mode of transportation he was to

utilize to return from a temporary duty post to his permanent duty post. As defendant states in his post-trial brief, this Court could take the "easy way out" and grant the United States' motion for summary judgment based upon the ruling in *Bissell*. But compare *Robbins v. United States*, 553 F.Supp. 598 (E.D.Mo. 1982), *rev'd*, 722 F.2d 387 (8th Cir. 1983), where the Eighth Circuit Court of Appeals remanded a case dismissed based upon the ruling in *Bissell* because the facts differed in two important respects. The Eighth Circuit found in *Robbins* that the government did reserve the right to control the serviceman's physical acts and movements while driving his personal car. *Robbins*, 722 F.2d at 389.

> "Assuming that *Bissell* correctly states current Missouri law, a question we need not decide in this case, we believe that there is a crucial difference between it and the instant case."

Robbins, 722 F.2d at 389. The Eighth Circuit Court of Appeals determined that the time limitation placed upon the military officer to reach his destination and the fact that the officer received a per diem allowance for the day of the accident revealed that the government did reserve the right to control the officer's physical acts. Accordingly, the officer was acting within the scope of his employment at the time of the collision. *Robbins*, 722 F.2d at 388-89. Upon remand, the district court found in favor of the plaintiffs and against the defendant United States of America. *Robbins v. United States*, 593 F.Supp. 634 (E.D. Mo. 1984). The difference in these decisions was not due to a change in the doctrine of respondeat superior in Missouri. The difference appears to revolve around a case by case determination. The evidence received in *Bissell* was apparently considered insufficient to demonstrate the

government's right to control a serviceman's physical acts or movements while driving his own personal vehicle. This Court has already found that the travel of Petty Officer Martin was deemed necessary in the furtherance of the military service. *See Robbins,* 722 F.2d at 389. Furthermore, there was overwhelming evidence that Petty Officer Martin was subject to military discipline and modifications concerning his travel orders throughout the entire time Petty Officer Martin was on travel status. "[I]t is not the fact of actual interference with control, but the right to interfere that marks the difference between an independent contractor and an agent or servant." *Smith v. Fine,* 175 S.W.2d 761, 766 (Mo. 1943), *quoting, Riggs v. Higgins,* 106 S.W.2d 1, 3 (Mo. 1937). There is no question in the Court's mind that the government reserved the right to control Petty Officer Martin's travel at the time of this accident.

Even in the often cited case of *Riggs v. Higgins,* 106 S.W.2d 1 (Mo. 1937) the Missouri Supreme Court distinguished cases wherein the employer would be held liable when the employer ratified the use of an employee's personal automobile for business purposes. *Id.* at 4. Defendant has admitted that Petty Officer Martin was an employee of the United States Navy and was on duty at the time of the accident. The Navy issued travel orders which granted Petty Officer Martin the authority to drive his personal vehicle to his permanent duty station in Idaho Falls, Idaho. The government paid Petty Officer Martin, *in advance,* mileage and per diem expenses expected to be incurred in the trip. Although eight days is substantially longer than the time allotted Major Loper in the *Robbins* case, the distance Petty Officer Martin was required to travel is correspondingly larger.

Another Eighth Circuit Court of Appeals' case which distinguished the holding in *Bissell,* but applied Iowa law is *United States v. Farmer,* 400 F.2d 107 (8th Cir. 1968), *aff'g, Farmer v. United States,* 261 F.Supp. 750 (S.D. Iowa 1966). The Eighth Circuit based its decision upon the more liberal rule controlling a finding of respondeat superior between a master and servant in Iowa as opposed to the Missouri doctrine. Private Bettin, whose conduct was in issue in the *Farmer* case had been authorized to travel in his own automobile and was given a travel allowance. He was required to report within 24 hours of departure to his assigned destination. This Court does not believe there is anything magic about a 24-hour limitation which existed in the *Farmer* and *Robbins* cases. The Court believes that those cases were distinguishable from the *Bissell* decision based upon their facts. So is the case here. Sgt. Thompkins, whose conduct was in issue in the *Bissell* case engaged in purely personal activities en route to his assigned destination. Additionally, leave time above travel time was provided in the Sergeant's orders. *Bissell,* 248 F.Supp. at 221; *Farmer,* 400 F.2d at 111, n. 3. In contract to the facts in *Bissell,* Petty Officer Martin was not on a frolic of his own. The government never disputed that for Petty Officer Martin to travel through Missouri, or even through Richmond, Missouri, where his parents lived was a direct route to his assigned destination. Although there is testimony that Petty Officer Martin planned to take leave time in addition to his travel time, the leave time was never taken and the original orders have not been found to confirm if the leave time was ever granted in advance to Petty Officer Martin.

By applying Missouri law, it is fairly obvious that Petty Officer Martin was in the course and scope of his employment at the time of his accident, based on all the evidence adduced at trial. Even though Petty Officer Martin planned to stop and spend the night with his parents in Richmond, Missouri, his primary purpose was to travel pursuant to orders "cut" by the Navy to Idaho Falls. Under Missouri law it is not required that the business purpose be the primary purpose or dominant motive for the trip, but simply that the service of the employer is the concurrent cause of the journey. *Burger Chef Systems, Inc. v. Govro,* 407 F.2d 921, 927 (8th Cir. 1969). Missouri courts have long recognized the doctrine of dual purpose travel. *O'Dell v. Lost Trail, Inc.,* 100 S.W.2d 289 (Mo. 1936). Therefore, the fact that Petty Officer Martin planned to stop and visit with his parents in Richmond, Missouri, does not bar his employer, the United States Navy from being liable for its employees negligence in this case.

Petty Officer Martin was on a direct route from Orlando, Florida, to Idaho Falls, Idaho. The Navy ordered his trip, authorized the use of his car, and reimbursed him for his expenses before he left Orlando, Florida. He was under orders at all times during the trip and was making the trip at Navy direction and to further the interests of the Navy. Accordingly, the Court enters the following conclusions of law.

CONCLUSIONS OF LAW

At the time of the accident, Petty Officer Martin was employed by the defendant United States of America,

Department of the Navy. Petty Officer Martin was driving his personal automobile, on December 5, 1981, from Orlando, Florida to Idaho Falls, Idaho to further serve the business of the Navy. The Navy had reserved the right to control Petty Officer Martin's acts and conduct. Petty Officer Martin was therefore in the course and scope of his employment with the Navy.

Petty Officer Martin was negligent in allowing his vehicle to cross the center line of a two-lane highway, specifically Highway 32 east of Bolivar, Missouri, which collided headon with plaintiffs' vehicle and plaintiffs made every reasonable effort to avoid the collision.

As a result of the negligence of Petty Officer Martin, a collision occurred between the Martin vehicle and the vehicle being driven by plaintiff George T. Pyle and occupied by plaintiff Shirley J. Pyle. As a direct and proximate result of the collision, both George and Shirley J. Pyle sustained severe injuries.

After fully considering the extent of plaintiff George T. Pyle's injuries, his pain and suffering and his life expectancy, the Court assesses damages against defendant United States of America and in favor of plaintiff George T. Pyle in the total amount of Two Hundred Thousand Dollars ($200,000.00).

After fully considering plaintiff Shirley J. Pyle's injuries, her pain and suffering and her life expectancy, the Court assesses damages against the defendant United States of America and in favor of plaintiff Shirley J. Pyle in the total amount of Fifty Thousand Dollars ($50,000.00).

JUDGMENT

The Court having this date entered its findings of fact and conclusions of law herein and finding the issues in favor of each of plaintiffs and against the defendant United States of America, NOW THEREFORE in accordance therewith, HEREBY ORDERS AND ADJUDGES (1) that plaintiff George T. Pyle have and recover of and from the defendant United States of America the sum of Two Hundred Thousand Dollars ($200,000) and costs and (2) that plaintiff Shirley J. Pyle have and recover of and from the defendant United States of America the sum of Fifty Thousand Dollars ($50,000.00).

/s/ William R. Collinson
William R. Collinson
United States Senior District Judge

July 14, 1986

(Filed July 14, 1986)

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
SOUTHERN DIVISION

CASE NUMBER 84-3381-CV-S-2

GEORGE T. PYLE and
SHIRLEY J. PYLE,

v.

UNITED STATES OF AMERICA

JUDGMENT IN A CIVIL CASE

☐ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

[X] Decision by Court. This action came to trial before the Court. The issues have been tried and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

That plaintiff George T. Pyle have and recover of and from the defendant United States of America the sum of Two Hundred Thousand Dollars ($200,000.00), and costs; further

That plaintiff Shirley J. Pyle have and recover of and from the defendant United States of America the sum of Fifty Thousand Dollars ($50,000.00).

R. F. Connor
Clerk

/s/ Nancy Crighton
(*By*) *Deputy Clerk*

July 14, 1986
Date

CERTIFICATE OF SERVICE

I hereby certify that two copies of the Brief for Defendant-Appellant were mailed this 26th day of November, 1986, to James P. Frickleton, Attorney at Law, 2390 City Center Square, Post Office Box 26490, Kansas City, Missouri 64196, Attorney for Plaintiffs-Appellees.

/s/ F. O. Griffin, Jr.
F. O. Griffin, Jr.
Assistant United States Attorney

(Filed August 27, 1987)

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 86-2150

George T. Pyle and
Shirley J. Pyle,
Appellees,

v.

United States of America,
Appellant.

Appeal from the United States District Court
for the Western District of Missouri.

Submitted: April 16, 1987
Filed: August 27, 1987

Before ROSS,* Circuit Judge, FLOYD R. GIBSON and HENLEY, Senior Circuit Judges.

ROSS, Senior Circuit Judge.

The United States appeals the judgment of the district court awarding $250,000 in damages to appellees George T. Pyle and Shirley J. Pyle on their claims brought pursuant to the Federal Tort Claims Act. For the reasons explained below, we reverse.

*The Honorable Donald R. Ross assumed senior status on June 13, 1987.

The Pyles' claims arose from injuries they sustained on December 5, 1981 when a vehicle driven by Patrick Martin crossed the center line of Highway 32 near Bolivar, Missouri and collided nearly head on with the Pyle vehicle. At the time of the accident, Martin was a Petty Officer in the United States Navy. The sole issue before this court is whether the district court erred in determining that Martin was within the scope of his employment with the Navy when the accident occurred.

At the time of the accident, Martin was en route from Naval Training School in Orlando, Florida, where he had been for about seven months, to his permanent duty station in Idaho Falls, Idaho. Martin was traveling pursuant to written orders, which allotted him eight days travel time and an additional number of days annual leave.[1]

Martin had received prior authorization from the Navy to use his own vehicle for transportation. Although he was not directed which route to take, he was paid mileage for the most direct route. Martin was drawing pay during his trip, and also received in advance a per diem for the eight travel days.[2]

At the time of the accident, Martin was subject to orders of commanding personnel at the Idaho Falls sta-

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1. The exact number of days leave time which Martin was allotted could not be ascertained by the district court because Martin's travel orders had been lost. Martin testified that he thought he had been given eight days leave time in addition to the eight travel days. Martin was never charged with the leave time, however, because after the accident his orders were changed and he was placed on temporary disability status while he recovered from his injuries.

2. Testimony at trial revealed that for trips by private vehicle, the Navy calculates travel time on a 300 mile per day basis.

tion. There was testimony that the Navy could have changed his travel orders at any time. However, unless he was notified of a change of orders, Martin was free to set his own agenda as long as he reported at Idaho Falls on the prescribed date. Martin was not required to call in or check with any Navy personnel during the course of his trip.

Martin, who was not in uniform at the time of the accident, testified that he had been traveling continuously since he left Orlando at 6:00 a.m. on December 4, except for approximately four hours when he pulled over to sleep. The accident occurred at about 7:00 a.m. on December 5. Martin testified that he was planning to spend the night of December 5 at his parents' home in Richmond, Missouri, which is approximately three hours from the scene of the accident.

We must apply the Missouri law of respondeat superior in determining whether Martin was within the scope of his employment at the time of the accident. *Bissell v. McElligott*, 369 F.2d 115, 117 (8th Cir. 1966), *cert. denied*, 387 U.S. 917 (1967). This court has previously considered on two occasions the question of whether a serviceman was acting within the scope of his employment under applicable Missouri law. *Compare Bissell, supra*, in which we determined that a serviceman was not acting within the scope of his employment, *with Robbins v. United States*, 722 F.2d 387 (8th Cir. 1983) in which we reached the opposite result. The determination of whether an employee was acting within the scope of his employment depends on the facts and circumstances of each case. *Burger Chef Systems, Inc. v. Govro*, 407 F.2d 921, 925 (8th Cir. 1969) (citing *Stokes v. Four-States Broadcasters, Inc.*, 300 S.W.2d 426, 428 (Mo. 1957)).

In *Bissell*, Tompkins, an Air Force sergeant, was in an automobile accident as he was returning to his permanent station from temporary schooling. Although not required to do so, Tompkins used his own vehicle for transportation. He was free to choose the route taken, and was paid mileage for the most direct route. Tompkins was required to be back at a specific time, but "[h]e was not required to hurry as leave time above travel time was provided in his orders." 369 F.2d at 118. Just prior to the time of the accident, Tompkins had stopped to visit his wife and his mother-in-law, although he had resumed his trip back to his permanent station when the accident occurred.

In *Bissell* we agreed with the district court's determination that under the applicable Missouri law of respondeat superior "an employer is liable for a negligent act of his servant only if '"the right of the employer to control the physical acts or movements of the employee *at the very moment of the occurrence*" is established.'" *Id.* at 118 (*citing Riggs v. Higgins*, 341 Mo. 1, 106 S.W.2d 1 (1937) (en banc); *Reiling v. Missouri Ins. Co.*, 236 Mo. App. 164, 153 S.W.2d 79 (1941)). In light of this standard, we determined that Tompkins was not acting within the scope of his employment at the time of the accident. We determined that no benefit accrued to the government by Tompkins' use of his own car for the trip. Further, we found no evidence that the government attempted to reserve any control over Tompkins' use of his automobile. *Id.* at 119.

In *Robbins, supra*, we distinguished the facts in *Bissell* to conclude that an Air Force major was within the scope of his employment when he was involved in an automobile accident. The Air Force major, Loper, was

traveling from temporary training at Scott Air Force Base in Illinois to his permanent station at Offutt Air Force Base near Omaha, Nebraska. Loper's orders required him to travel the distance (about 450 miles) in one day. He was authorized, although not required, to use his own vehicle and was paid travel expenses and a per diem. At the time of the accident, Loper was traveling a direct route between Scott Air Force Base and Offutt Air Force Base. He was on active duty and in uniform.

We noted in *Robbins* that the "crucial" difference between tnat case and *Bissell* was the time allotted each officer for traveling:

> "we think there is a demonstrable difference between the relationship of an army officer traveling from one permanent base to another at government expense, with leave en route, and one without leave whose travel is expressly 'deemed necessary in the military service.' In the former instance, the officer's only duty is to report at a certain place at a certain time; while in the latter, his time belongs to the government and is measured out to him."

722 F.2d at 389 (quoting *United States v. Mraz*, 255 F.2d 115, 117 (10th Cir. 1958)). Because Loper was given only one day to travel 450 miles, we determined that the government did in fact reserve the right to control Loper's movements in driving his car.

After reviewing our decisions in *Bissell* and *Robbins*, and in light of the Missouri law of respondeat superior, we find that the district court in this case erred in determining that Martin was acting within the scope of his

employment at the time of the accident. We believe that the facts of this case are closely analogous to those in *Bissell*. Like Tompkins in *Bissell*, Martin was not required to use his own vehicle for the trip, although he chose to do so. No benefit accrued to the government by Martin's choice to use his own vehicle rather than commercial transportation. Further, as in *Bissell*, Martin was free to set his own agenda. Martin was not required to check in or report to Navy officials during the course of his trip, nor did he have to perform any Navy related duties. It is also significant to our decision that Martin, like Tompkins in *Bissell*, was not required to hurry, as he had up to eight days leave in addition to his travel time. Unlike Major Loper in *Robbins*, we cannot say that Martin's time was "measured out to him" or "belonged to the government." As a result, we determine that the Navy had no reservation of the right to control Martin's acts, such that he was not acting within the scope of employment at the time of the accident.

In making its determination that Martin was acting within the scope of his employment, the district court emphasized that Martin "was subject to military discipline and modifications concerning his travel orders." The district court further noted that Martin would have been required to obey an order of his commander had the commander been along with Martin on his travel. However, Martin testified that under the Navy's command structure, he would have been subject to orders of authorized commanding personnel even while on vacation. However, that alone is not sufficient to place Martin's acts within the scope of his employment. As we noted in *Bissell*, "the unique control which the Government maintains over a soldier has little if any bearing upon

determining whether his activity is within the scope of his employment." 369 F.2d at 119.[4]

Consequently, because we find that the Navy did not reserve the right to control Martin's acts while he was traveling, we determine that Martin was not acting within the scope of his employment at the time his automobile collided with the Pyle vehicle. Therefore, we reverse the judgment of the district court.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

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4. After finding that Marttin was acting within the scope of his employment at the time of the accident, the district court determined that the fact that Martin was traveling to his parents' house did not remove him from the scope of his employment, pursuant to the dual purpose doctrine as set out in *Burger Chef Systems, Inc. v. Govro*, 407 F.2d 921, 926-927 (8th Cir. 1969). Our determination that Martin was not acting within the scope of his employment because the Navy failed to reserve the right to control his acts obviates the need to discuss this finding by the district court.